

In the Matter of: )  
 ) Docket No.  
Application for Certification ) 99-AFC-4  
for the Moss Landing Power )  
Plant Project )

PETERS SHORTHAND REPORTING CORPORATION (916) 362-2345

COMMITTEE MEMBERS PRESENT

William J. Keese, Chairman

Michal A. Moore,

Gary Fay, Hearing Officer

STAFF PRESENT

Jeffery Ogata, Staff Counsel

Richard Buell, Acting Project Manager

PUBLIC ADVISER

Roberta Mendonca

APPLICANT

Chris Ellison, Attorney  
Ellison and Schneider

Mark Seedall, Duke Energy North America

Wayne J. Hoffman, Duke Energy North America

Brian Waters, Duke Energy North America

ALSO PRESENT

Mark Wolfe, CURE

David L. Mayer, Tenera Energy

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1 P R O C E E D I N G S

2 PRESIDING MEMBER KEESE: This is a  
3 Prehearing Conference conducted by a Committee of  
4 the California Energy Commission on the  
5 Application for Certification by Duke Energy North  
6 America for the Moss Landing Power Plant Project.

7 Before we begin, we'd like to introduce  
8 the Committee and the participants. We'll let the  
9 parties introduce themselves.

10 I'm Bill Keese, Chair of this Committee.  
11 Commissioner Michal Moore joins me on the  
12 Committee. Melissa Jones is here with  
13 Commissioner Moore, and Cynthia Praul will most  
14 likely be here with me.

15 Our Hearing Officer is Gary Fay, and at  
16 this time I'd like to ask the parties to introduce  
17 themselves.

18 Mr. Ellison, would you like to introduce  
19 the Applicant's representatives?

20 MR. ELLISON: Thank you, Chairman Keese,  
21 and Commissioner Moore.

22 My name is Chris Ellison from the law  
23 firm of Ellison and Schneider, representing Duke  
24 Energy in this proceeding.

25 I'll say that again. And for the

1 benefit of the reporter, my name is Chris Ellison,  
2 Ellison and Schneider, representing Duke Energy in  
3 this proceeding.

4 MR. SEEDALL: Good afternoon. My name  
5 is Mark Seedall. I'm Duke's Director of Electric  
6 Modernization for the Moss Landing ground field  
7 redevelopment.

8 PRESIDING MEMBER KEESE: Thank you. And  
9 that's what you have for -- that's Duke?

10 Mr. Richins. No? Oh. Mr. Richard  
11 Buell.

12 MR. BUELL: My name is Rick Buell, and  
13 I'm the Acting Project Manager while Paul Richins  
14 is off climbing mountains.

15 PRESIDING MEMBER KEESE: I remember that  
16 now.

17 MR. OGATA: I'm Jeff Ogata, CEC Staff  
18 Counsel.

19 PRESIDING MEMBER KEESE: Okay. You're  
20 --

21 MR. WOLFE: I'm Mark Wolfe, with the law  
22 firm of Adams, Broadwell, Joseph and Cardozo, here  
23 on behalf of CURE.

24 PRESIDING MEMBER KEESE: Thank you.

25 And Roberta Mendonca, we're -- are we

1 going to -- get a report from you later, are we?

2 PUBLIC ADVISER MENDONCA: Fine.

3 PRESIDING MEMBER KEESE: Okay.

4 Any agencies here?

5 Members of the public who wish to be  
6 introduced? It does not preclude participation  
7 later.

8 Thank you. I will hand this over to Mr.  
9 Fay.

10 HEARING OFFICER FAY: Thank you, Mr.  
11 Chairman.

12 Since we had no indication that any  
13 members of the public are here, I think we might  
14 save some time today by -- if Ms. Mendonca is --  
15 is comfortable with this, by dispensing with her  
16 explanation, since everybody here is -- is  
17 represented.

18 PUBLIC ADVISER MENDONCA: I would make  
19 one comment for the record.

20 My name is Roberta Mendonca, and I'm the  
21 Public Adviser. Today is the deadline for  
22 intervention, and the Public Adviser's office has  
23 had no indication from anybody in the community of  
24 any interest in intervening in this case.

25 HEARING OFFICER FAY: Great. Thank you.

1       That's very helpful.

2               All right. I'd like to just read a  
3       background statement first, before we get started.  
4       Then I'm going to ask the parties to bring us up  
5       to date on what they have achieved this morning in  
6       their workshop.

7               On April 12th, 2000, the Committee  
8       issued a notice scheduling this Prehearing  
9       Conference, based on information from the  
10      Commission staff and the Committee's revised  
11      scheduling order issued February 24th, and  
12      anticipated that the Air District's final  
13      determination of compliance would be filed on or  
14      about April 15th of this year. However, in its  
15      Prehearing Conference statement, staff informed  
16      the Committee that as of that time, April 28th,  
17      the District had not provided staff with the FDOC.

18              To date, we have not seen that document,  
19      which is now 23 days later than the date the  
20      Committee's revised scheduling order called for.

21              In addition, staff claims in its  
22      Prehearing Conference statement, that the -- the  
23      draft NPDES permit, or preliminary draft, is  
24      missing information which is critical for staff to  
25      have in order to complete its final analysis.

1           Today, we'll discuss the implications of  
2       these late filings, and any other remaining data  
3       deficiencies, as they may affect the 12-month AFC  
4       schedule.

5           In response to the Prehearing Conference  
6       notice, the parties filed statements in which they  
7       express their concern regarding certain issues,  
8       including Air Quality, Biology, Water Quality, and  
9       Alternatives, which I understand is mainly a  
10      concern about timing and availability of  
11      information, rather than a -- a actual dispute.

12           The purpose of today's Prehearing  
13      Conference is to assess when the parties will be  
14      ready for Evidentiary Hearings; to identify the  
15      areas of agreement or dispute, if any; and to  
16      discuss the procedures that are necessary to  
17      conclude the certification process. In this  
18      regard, the Committee will ask the parties to  
19      present their respective positions on the issue  
20      areas, to discuss the filing dates for testimony  
21      and other evidentiary documents.

22           We also want to hear from agency  
23      representatives on the status of their  
24      representative reviews of this project.

25           The Public Adviser has spoken to you



1       already, and I guess what I'd like to do right now  
2       is just informally give the Applicant and staff an  
3       opportunity to bring the Committee up to date on  
4       what you achieved this morning in regards to how  
5       it might affect our schedule, in terms of getting  
6       things filed in the record. And -- and then we  
7       can kind of march through a laundry list of the  
8       topic areas, just to be sure we know exactly what  
9       is complete and ready to go, as per the  
10      Committee's order filed on -- with testimony to be  
11      filed on May 15th, and areas that cannot make that  
12      deadline, and then when you can file the testimony  
13      for them.

14               I believe I've informed all the parties,  
15      but just to give you an idea as we work through  
16      this afternoon, we have reserved Committee time  
17      for Evidentiary Hearings on June 7th and 8th, here  
18      at the Commission; June 15th in Moss Landing; and  
19      July 5th and 6th in Moss Landing. These are not  
20      scheduled by order, but it's a target and at least  
21      might help us in our discussions today. And if  
22      there's a problem with any of those dates, let us  
23      know, and if we can work with them, then that's  
24      easy because they are reserved already.

25               Okay. So why don't we begin. Mr.

1       Ellison, would you like to take the lead on this?

2               MR. ELLISON:   Thank you, Mr. Fay.

3               Let me see if I can set the stage for  
4       our discussion.   The Committee's current  
5       scheduling order, issued after the February 24th  
6       status conference, calls for the production of the  
7       Final Staff Assessment on May 15th for all issues,  
8       but does provide for a day for day slip in that  
9       schedule for -- potentially for water issues and  
10      air issues, and some issues that are related to  
11      those, if certain reports are not available by  
12      April 15th.

13              To quote from the Committee's order, it  
14      says,

15                      "Any delay in receiving the  
16                      requisite Air or Water Quality reports  
17                      from outside agencies will only cause a  
18                      day for day slip in filing the affected  
19                      topic areas of the FSA.   And regardless  
20                      of the delays in receiving Air or Water  
21                      Quality information, staff will file all  
22                      other FSA sections on May 15th, 2000.  
23                      Applicant and other parties will file  
24                      their testimony on that day, as well.  
25                      The Committee anticipates that

1                   Evidentiary Hearings will begin in  
2                   early June."

3                   So that's the order in this proceeding,  
4           as we sit here today. Let me now address the  
5           status of the reports that were referenced.

6                   First, the Air Quality report. That  
7           report, of course, is the final determination of  
8           compliance. Duke understands that that final  
9           determination of compliance is complete, and is  
10          literally sitting on the desk waiting for  
11          signature today, and should be at the Commission,  
12          final and completely signed, this week, no later  
13          than the 12th.

14                  We also understand, from having worked  
15          closely with the APCD and staff, that there are no  
16          issues to be adjudicated with respect to that  
17          report.

18                  Turning to the Water reports, there are  
19          essentially three reports at issue here. The  
20          first is the final 316B study, that addresses  
21          impingement and entrainment issues, among others.  
22          Second is the thermal plan study, and the third is  
23          the draft NPDES permit.

24                  The 316B study and the thermal plan  
25          study are final, have been filed and docketed, I

1 believe, on the 28th is when they were docketed.

2 The draft NPDES permit was issued by the  
3 Water Board staff for comment on the 21st of  
4 April. Duke has submitted some comments that are  
5 in the nature of clarifications to the Water Board  
6 staff, and we expect them to respond to those  
7 comments this week.

8 So we expect that there will be a, if  
9 you will, a final draft of that NPDES permit this  
10 week, and we expect that it will not differ in any  
11 significant way from the draft that has been  
12 available since the 21st of April.

13 Based on that status, it is the  
14 Applicant's position that the day for day slip  
15 called for in the Committee order would result in  
16 a slip of really only a few days. The -- the  
17 draft permit, in our view, was substantively  
18 available on the 21st of April, rather than the  
19 15th, and the reports that we discussed, the  
20 thermal plan and the 316B reports, were available  
21 in draft for a long time prior to their being  
22 absolutely final on the 28th of April.

23 So it is the Applicant's position that  
24 the information called for to proceed with  
25 hearings has been filed either on time, or very

1 close to on time, and we believe that this case  
2 should be able to proceed to hearings in June.

3 Stepping back from that, however, the  
4 staff has made clear that they would like to have  
5 more time, and we did have a workshop this morning  
6 to discuss providing the staff with that  
7 additional time on -- on certain issues. And I  
8 want -- I want to address the Applicant's position  
9 with respect to that.

10 The position of the Applicant really is  
11 quite simple. In order to be online for the  
12 summer of 2002, this project needs to begin  
13 construction in October. In order to begin  
14 construction in October, the Applicant has to have  
15 all permits, because obviously the Applicant's  
16 Board of Directors is not going to authorize the  
17 expenditure of \$500 million to proceed without all  
18 the permits, and it would not be lawful to proceed  
19 without all the permits.

20 The Water Board must issue a exception,  
21 a proven exception to the thermal plan, and they  
22 have intended to do that at a meeting of the Water  
23 Board scheduled for mid-September. In order for  
24 them to do that, they have -- they will rely upon  
25 the Energy Commission's environmental

1 documentation to comply with CEQA.

2 We are amenable to any schedule which  
3 results in the -- the project being able to  
4 commence construction in October. And we would  
5 oppose any schedule which does not allow the  
6 project to begin construction in October.

7 So the focus of our discussion with the  
8 staff this morning was to see if there was a  
9 schedule that could be worked out between us and  
10 the staff that would accommodate the staff's  
11 desire for additional time without compromising  
12 the October commencement of construction date.

13 And what we arrived at was a proposed  
14 schedule that would have the -- let me take the  
15 water issues up first, because those are the most  
16 important -- would have the --

17 HEARING OFFICER FAY: If I can interrupt  
18 you just a second. The Water Board exception  
19 would be determined when?

20 MR. ELLISON: The final approval of that  
21 by the Water Board was -- the schedule that we  
22 have contemplated would -- they have a meeting in  
23 mid-September.

24 HEARING OFFICER FAY: Mid-September.

25 MR. ELLISON: Now, I don't know the

1 exact date off the top of my head.

2 HEARING OFFICER FAY: And when do they  
3 or their staff need whatever it is they consider  
4 the CEQA document?

5 MR. ELLISON: Prior to that time. They  
6 don't need it, in my judgment, any specific number  
7 of days ahead of that. It's compliance with CEQA,  
8 they have to have a --

9 HEARING OFFICER FAY: Sure.

10 MR. ELLISON: -- environmental document  
11 that they have considered prior to making their  
12 discretionary decision on the exception to the  
13 thermal plan.

14 Up to this point in this proceeding, we  
15 have not had need to discuss whether any document  
16 earlier in the Energy Commission's process than  
17 the Final Decision might fill that need, so we  
18 have not had that conversation with the Water  
19 Board at this point. We may need to have that  
20 conversation with them. But I wanted you to be  
21 aware of that -- that date.

22 And as we discussed --

23 PRESIDING MEMBER KEESE: I'm sorry,  
24 that's September 16th, or were you -- September --

25 MR. ELLISON: The closest I can say at

1 the moment is mid-September. We heard this  
2 morning that it might be the 11th to 15th. We're  
3 not quite sure.

4 PRESIDING MEMBER KEESE: That's when  
5 they're going to meet.

6 MR. ELLISON: Yes. But they have set up  
7 a meeting for that time.

8 The --

9 MR. WATERS: If I may interject, I -- I  
10 looked this morning at the draft --

11 HEARING OFFICER FAY: You'll have to  
12 come forward and give your name.

13 MR. WATERS: Okay. Brian Waters, with  
14 Duke Energy.

15 I was looking this morning at the draft  
16 permit, and it has an expiration of September  
17 15th, 2005. So I believe that would indicate that  
18 their meeting is September 15th, 2000.

19 HEARING OFFICER FAY: Okay.

20 MR. WATERS: Because they're a five-year  
21 permit.

22 PRESIDING MEMBER KEESE: Thank you.

23 MR. ELLISON: In our workshop this  
24 morning, the proposal which the staff and the  
25 Applicant tentatively agreed upon, subject to the



1 ability of the Committee to produce a decision  
2 consistent with the October construction schedule,  
3 is as follows, but I emphasize that caveat that  
4 Duke's agreement to this schedule is predicated on  
5 the assumption that the Committee can issue a  
6 decision that allows construction in October.

7 It would have the staff producing an FSA  
8 on May 15th for most issues, and we can talk about  
9 the exceptions in a moment. But the exceptions  
10 would be Water, Biology, Air, Land Use, and  
11 Alternatives, I believe. Several of those, for  
12 example Alternatives, are not ready to go forward  
13 simply because the Water issues are not ready to  
14 go forward. So the issues are the same.

15 With respect to Air, I think I've  
16 described the situation with respect to that. We  
17 expect that the staff would not be in a position  
18 to produce an FSA on May 15th on the Air issues,  
19 but in our view should be able to do that by the  
20 end of May, and that we should be able to take  
21 that up at the hearings in mid-June, a June 15th  
22 hearing.

23 With respect to the Water issues, the  
24 proposal was to have a Final Staff Assessment  
25 released around the 23rd of June, and to go to

1       hearings on those issues at the July 5th and 6th  
2       date. But again, I emphasize that Duke's  
3       willingness to agree to that schedule is  
4       predicated upon the ability of the Committee to  
5       produce a decision following those July 5th and  
6       6th hearings that would allow construction to  
7       start in October.

8               HEARING OFFICER FAY: Let me just  
9       interject. The regulations require that the FSA  
10      be published at least 14 days prior to the  
11      Evidentiary Hearing. So if the FSA is divided up  
12      into segments, then the hearing could not take  
13      place sooner than 14 days after the segment was  
14      issued. Just --

15             MR. WATERS: Yes, I believe this morning  
16      we were under the assumption that we would be  
17      having hearings, I think, on the 5th -- 7th and  
18      8th of July. So if you back that up, we'd have to  
19      publish the Water and Biology and Alternatives PSA  
20      -- FSA, excuse me, on the 21st of June to meet the  
21      hearing requirements.

22             HEARING OFFICER FAY: Okay.

23             MR. ELLISON: There is a -- one  
24      outstanding Land Use issue that we talked about in  
25      this morning's workshop. We are confident that we

1       can work this issue out, but it does involve some  
2       further discussions with the Coastal Commission.  
3       Based on that information, we would expect that  
4       the staff would not produce the Land Use section  
5       until the Air Quality FSA piece would be done, and  
6       that that Land Use issue could be taken up on the  
7       15th.

8               So to summarize, we think that the vast  
9       majority of the issues should be ready to go to  
10      hearing and should not be -- involve any serious  
11      adjudication on June 7th and 8th; that Air  
12      Quality, Land Use, and the issues -- the remaining  
13      issues that are unrelated to the Water studies  
14      could be taken up on June 15th, and that the Water  
15      issues could be taken up on July 5th and 6th.

16             If that July 5th and 6th disposition of  
17      the Water issues, however, does not put the  
18      Committee in a posture to issue a decision that  
19      allows construction by October, it would be the  
20      Applicant's position that the staff should be able  
21      to produce the FSA earlier.

22             But if it is consistent with the October  
23      construction date, we would be willing to have the  
24      FSA delayed until that time.

25             HEARING OFFICER FAY: Mr. Ellison,

1       October has 31 days, according to my calendar.

2       And are we talking about October 1, or October 31?

3       Because that could make a difference.

4               MR. ELLISON:  Let me consult with my  
5       client for a moment.

6               (Pause.)

7               MR. ELLISON:  The current schedule that  
8       we have calls for October 1st as the commencement  
9       of construction.  What Mr. Seedall just informed  
10      was that, you know, the earlier in October, the  
11      better, but that anytime in October might be  
12      workable.  But once you slip past October, there's  
13      no more opportunity to meet that online date.

14              COMMISSIONER MOORE:  I have a question  
15      for you, Mr. Ellison, and that is, I might have  
16      misunderstood, but I thought you said that you  
17      wanted to be producing energy by mid-summer of  
18      2002.  Is that correct?

19              MR. ELLISON:  By the peak period of  
20      2002.  That's correct.

21              COMMISSIONER MOORE:  And so that summer,  
22      even the mid -- in the mid-peak period, is 30, 40  
23      days longer.  You're being a little indefinite  
24      about that, but you're being very definite about  
25      the October date.  So I'm a bit at a loss to

1 understand, because I don't know the construction  
2 particulars of this plant, why a critical date of  
3 October 1st, which I'm going to guess is simply  
4 impossible -- I mean, I -- rather than let other  
5 people bleed the bad news out, I don't think that  
6 -- that's doable at all, given the kind of  
7 constraints that Mr. Fay has on his end, or the  
8 ability to produce the document. I could be  
9 corrected, but I bet it isn't.

10 But that still doesn't help me  
11 understand how mid-summer can be a little  
12 amorphous, but an October 31st date can be so set  
13 in concrete. What's the nature of the  
14 construction activity that is so time dependent at  
15 the front end?

16 MR. ELLISON: Well, let -- let me -- the  
17 amorphousness is my fault, Commissioner. The  
18 Applicant's schedule calls for an online date of  
19 June 1st of 2000, in order to be available for all  
20 of the time period after that. The October 1st  
21 date is predicated on a construction schedule  
22 consistent with that. And that is a rapid  
23 construction schedule, without any slippage in it.

24 COMMISSIONER MOORE: All right. In  
25 other words, you're telling me that -- that that

1 construction schedule is as tight as it can get,  
2 doesn't allow for any errors at that end, and it's  
3 got to commence on October X, in order to make a  
4 June 1st deadline.

5 MR. ELLISON: Well, I don't -- I don't  
6 want to be that extreme about it, Commissioner.  
7 As -- as I suggested, you know, if -- if, you  
8 know, I'm not suggesting that if the, you know,  
9 the construction couldn't start until October 2nd,  
10 that all is lost. I mean, there clearly are some  
11 remedies available to -- to an Applicant to try  
12 and, you know, work harder and shorten that  
13 construction schedule. And that's why I mentioned  
14 online in October.

15 But once --

16 COMMISSIONER MOORE: Well, obviously --

17 MR. ELLISON: -- once you shorten it by  
18 more than 30 days, the opportunity to recapture  
19 the time is pretty much lost.

20 COMMISSIONER MOORE: Well, I -- I'm  
21 sensitive to that. I think everyone on the dais  
22 is, and no one wants to see a power source that we  
23 might ultimately grant certification for, in any  
24 case, go just because some time deadline wasn't  
25 met.

1                   But I still don't understand what the  
2           construction component is that is so critical to  
3           -- to making the deadline that's at the front end.  
4           I -- I would simply add for the record that I -- I  
5           spent some 12 years in and out of the permit  
6           process in Monterey County, and working with  
7           engineers and constructors, and I have to say  
8           tight time deadlines, construction activities, and  
9           getting things in under deadline in the Monterey  
10          Peninsula is probably an oxymoron. So I'm -- I'd  
11          be fascinated to hear how a time deadline that's  
12          that tight is -- is achieved with some surety.  
13          Because I'd hate to be the one that slam dunked it  
14          at this end only to find out that it got upset  
15          because of something foreseeable at the other end.

16                   MR. ELLISON: Commissioner, is your  
17          question what happens during that period of time,  
18          and how --

19                   COMMISSIONER MOORE: No, I -- what --  
20          what's so time sensitive at the front end that has  
21          to be initiated. I'm assuming some of this is  
22          weather dependent, or seasonal -- seasonally  
23          dependent. I --

24                   MR. ELLISON: Well, the quick answer  
25          from the lawyer is that it takes that long to

1 build a project of this size. We can present  
2 someone here today, if you wish, that can walk you  
3 through what has to be done during that period of  
4 time, and why it takes that period of time, and  
5 what sort of flexibility there is. We'd be happy  
6 to do that, if you wish.

7 COMMISSIONER MOORE: Well, I -- you're  
8 asking us to -- to bend over tremendously and be  
9 very, very flexible in order to accommodate a  
10 critical need. And I -- I guess you have my  
11 curiosity aroused as to -- as to what makes that  
12 time schedule so critical, and so doable only with  
13 -- with that start date. So that's the nature of  
14 my question. I'm not -- and I'm not sure that I  
15 hear an answer to it.

16 MR. ELLISON: Commissioners, let me --  
17 let me be clear about something here. From Duke's  
18 perspective, it is not Duke that is asking the  
19 Commission to bend over backwards. It is the  
20 staff. And we say that because the October 1st  
21 date has been there all along. We -- we spoke to  
22 the Committee about that back in February.  
23 There's nothing new about that.

24 We believe, and are prepared to defend,  
25 that the information that the staff needs to do



1       its work is in its hands. And we believe that the  
2       Final Staff Assessment could be accelerated from  
3       the schedule that we agreed to with the staff this  
4       morning.

5               I simply wanted you to understand that  
6       as far as Duke is concerned, we're willing to let  
7       the staff have more time, provided it's consistent  
8       with that October 1st date. If it's not, if the  
9       Committee finds that too constraining, and I can  
10      understand why it might, then Duke's position is  
11      that the FSA should be accelerated from what the  
12      staff was proposing this morning. And I'm happy  
13      to defend that position, if that's the Committee's  
14      desire.

15             The point is simply this. We didn't  
16      want to argue with the staff, or have a  
17      disagreement with the staff, if it didn't have a  
18      practical consequence to Duke. And so, in effect,  
19      that's what we've done. We've agreed to something  
20      subject to the Committee's concurrence that it  
21      doesn't interfere with the construction schedule.  
22      But if the Committee believes that it does, then  
23      we do have a disagreement with the staff about its  
24      time schedule for production of the FSA on the  
25      Water issues.

1                   PRESIDING MEMBER KEESE: Well, why don't  
2                   -- just a second.

3                   (Pause.)

4                   HEARING OFFICER FAY: Thanks. Anything  
5                   further, Mr. Ellison?

6                   MR. ELLISON: No. I'd be happy to  
7                   answer any questions, however.

8                   HEARING OFFICER FAY: Okay.

9                   PRESIDING MEMBER KEESE: I was doing  
10                  dates, Mr. Ellison. Did -- I've heard other  
11                  developers suggest that they want to have their  
12                  power plant online on July 1st. Is that -- did  
13                  you -- did you state a date when you were in this  
14                  dialogue here, that I --

15                  MR. ELLISON: June 1st was the date that  
16                  I stated.

17                  PRESIDING MEMBER KEESE: June 1st was  
18                  the date that you're hoping for. Thank you.

19                  HEARING OFFICER FAY: Okay. Why don't  
20                  -- before we make any further calls on this from  
21                  the Committee, or discuss it any further, move to  
22                  the staff and then to CURE, and hear your comments  
23                  on what happened in the workshop, and how it  
24                  affects the ability to file in a timely way.

25                  MR. BUELL: Yes. Why don't I just pick

1 up on a few points that I heard Mr. Ellison make,  
2 and staff's observation about dates and what-not.

3 Staff is trying to accommodate the  
4 Applicant's need for a decision on this project.  
5 For example, I would indicate that we would have  
6 30 days to -- after the FDOC as to -- been  
7 released, to prepare our Air Quality FSA, yet  
8 we're trying to accommodate the Applicant by  
9 having that out by the end of this month, which is  
10 approximately 12 days sooner than the --

11 HEARING OFFICER FAY: What date would  
12 that be?

13 MR. BUELL: -- previous agreement. By  
14 the end of this month we need to publish the FSA  
15 for Air Quality, also Land Use. As Chris Ellison  
16 had indicated.

17 The other thing is, is that although we  
18 have received copies of the draft NPDES, as Chris  
19 indicated, we expect to have a final copy, or a  
20 final draft of that, those conditions, by late  
21 this week. The actual start date, one  
22 interpretation of start dates, would be that it  
23 would -- the 30-day clock would start this Friday,  
24 and not back in -- on the 21st of April.

25 But I don't want to quibble about what

1 the actual start date is, but try to focus on  
2 whether or not we can actually meet a schedule  
3 that would accommodate the Applicant's need for  
4 starting construction in October of this year, and  
5 finishing by June of 2002.

6 One of the major things that I think is  
7 missing at this point, from staff's perspective,  
8 in all the information that we've received from  
9 the Applicant, and I would agree we've received  
10 most everything that we need, but there's details  
11 regarding compliance monitoring and also  
12 mitigation that need to be worked out. We have  
13 just started some of those discussions today with  
14 the Applicant, and I think there's a lot of work  
15 to be -- left to be done with not only the  
16 Applicant on what appropriate monitoring and  
17 mitigation is required, but also with the local  
18 agencies.

19 And staff has proposed today, at the  
20 workshop, a schedule for having workshops with  
21 agencies to try to work out what those conditions  
22 are, as well as workshops with the Applicant to  
23 try to work out those details prior to going to  
24 hearing. We think that that kind of a schedule  
25 would accommodate the Committee having a clean

1 record at the Evidentiary Hearings, and what all  
2 the parties agree to.

3 So the additional time that we're asking  
4 for here is necessary, in staff's mind, to present  
5 a clear and concise recommendation to the  
6 Committee.

7 We believe the schedule that will call  
8 for publishing an FSA for Biology and Water and  
9 Alternatives by June 21st is a doable. My staff  
10 would like to have more time, but I'm here to try  
11 to accommodate all the parties, including the  
12 Applicant.

13 HEARING OFFICER FAY: Okay. Anything  
14 further?

15 MR. BUELL: No. That concludes my  
16 remarks.

17 HEARING OFFICER FAY: Mr. Ogata,  
18 anything further?

19 MR. OGATA: No, I think Mr. Buell has  
20 summarized where we are quite fine.

21 HEARING OFFICER FAY: Mr. Wolfe, any  
22 comments on this?

23 MR. WOLFE: We're essentially amenable  
24 to any schedule that can be worked out by the  
25 Applicant and staff that's consistent with the

1 regulations.

2 HEARING OFFICER FAY: Okay. Well,  
3 you've heard Commissioner Moore express his doubts  
4 about whether the Committee could provide a  
5 proposed decision that would allow for an October  
6 1 date. The -- the Business Meetings in -- and  
7 this is something to keep in mind, too, if we had  
8 this time schedule -- in October are on October 11  
9 and October 25th.

10 I think I would have to agree, in fact I  
11 advised the Committee that October, early October  
12 is not realistic. October 11th, even, I don't  
13 think is realistic. And part of the concern the  
14 Committee has is there's no way for the Committee  
15 to know in advance what -- what the state of the  
16 record will be on these late topics, which are  
17 often problematical, and that's why they're the  
18 last ones to be heard. That's the kind of thing  
19 that makes a topic late.

20 So we don't know what Water and Biology  
21 are going to entail. And it's impossible to  
22 commit to, you know, the best case scenario  
23 without having that record. I don't know what --  
24 what position that puts the Applicant in, in terms  
25 of trying to accommodate staff.

1                   Obviously, the Committee's spoken in its  
2           order, as Mr. Ellison reminded us, and I would  
3           have to advise the Committee to -- to stick with  
4           its order for the sake of the process, and, you  
5           know, the timeliness that we're required by  
6           statute to keep, to the extent possible.

7                   We charge the Applicant with the  
8           responsibility of all delays outside the  
9           Commission, and we'll continue to do so. The  
10          FDOC, to the extent it's been late, is also on a  
11          day for day slip, as the order says. But beyond  
12          that, it may be a problem for staff to get  
13          everything it wants. I'm not sure quite how to  
14          resolve this for you, and what -- what it means in  
15          terms of your postures in the case.

16                  But I can tell you that -- that an early  
17          October action by the Committee would require an  
18          early August proposed decision, which would be two  
19          or three weeks after the close of the record. And  
20          there would certainly need to be briefs on these  
21          last topics. It's just not very realistic. If  
22          you're talking about the end of October, things  
23          start to open up.

24                  So I can't give you a firm answer, other  
25          than to advise, as I just have, of the -- of the

1 Committee's concerns, and how -- and what it needs  
2 to do its job. You know, I'm not sure quite how  
3 that affects the parties and how they want to  
4 proceed.

5 It's very difficult to give guarantees  
6 when we don't yet have a record. And, you know,  
7 one could -- could estimate based on a best case  
8 and worst case scenario, but we don't know quite  
9 what we're going to have, from this point.

10 I'm not sure if any of you have anything  
11 further to say on that aspect. If you do, I'd  
12 invite your comments. Otherwise, I think we'll  
13 kind of march through the topics and see -- just  
14 try to nail down exactly how much time it's likely  
15 to take.

16 I -- I would like to recommend to the  
17 Committee that in light of the lack of intervenors  
18 in this case, and the apparent public  
19 acquiescence, if not support for the project, that  
20 we hold most of the topics, the hearings here in  
21 Sacramento, and that the information be entered in  
22 the record on declaration, which would be  
23 expeditious, and with the caveat that if -- if  
24 anybody does show up from an agency, or a member  
25 of the public, and has questions that the project



1 manager or the representatives cannot answer, that  
2 we may have to call witnesses later. But I think  
3 we can move very quickly in those first two days  
4 and take most of the topics.

5 It looks to me like then, with the  
6 exception of Water, Biology, and Alternatives, we  
7 could take the evidence on everything else. Is  
8 that correct?

9 That -- that is the June 15th date would  
10 -- would -- by June 15th we would've received the  
11 evidence. Everything except Water, Biology, and  
12 Alternatives.

13 MR. ELLISON: From the Applicant's  
14 perspective, that -- that's correct, and I would  
15 add it's also the Applicant's position that staff  
16 should be able to produce the Water and Biology  
17 issues in time for hearing at that time, as well.  
18 That's where our disagreement lies.

19 HEARING OFFICER FAY: Mr. Buell, let's  
20 explore that. Why -- why couldn't staff produce  
21 Water and Biology on that time schedule? What --  
22 what is the missing part? Your monitoring --  
23 monitoring and compliance features, is that --

24 MR. BUELL: Primarily, yeah. I think  
25 it's twofold. One is that staff had a different

1 understanding of what started the 30 day clock and  
2 what the Applicant understood, or perhaps what the  
3 Committee understood. In retrospect, I suppose  
4 that staff made an error in agreeing to say that  
5 they were ready to produce an FSA 30 days after  
6 receiving the information, the draft.  
7 Specifically, the draft NPDES permit.

8 Staff was looking for more traditionally  
9 what we've accepted, in terms of starting your  
10 clock for producing an analysis, and that would've  
11 been the staff report from the Regional Water  
12 Quality Control Board that provided the basis for  
13 the Board's conditions of -- contained in the  
14 NPDES permit.

15 Barring that, and given that we're  
16 dealing with a different item, we're trying to  
17 piece together the information that is contained  
18 in various locations, such as the 316A and B  
19 studies, and the Applicant's enhancement program,  
20 mitigation program that they've identified, which  
21 has not been docketed yet, but we expect to  
22 receive by the end of this week, that document.

23 We're still looking to find the final  
24 permit conditions from our draft permit conditions  
25 from the Regional Water Quality Control Board.

1       They had sent out earlier a set of draft  
2       conditions to the working group, which are still  
3       under review. We understand those will be  
4       finalized and filed this Friday. So from our  
5       perspective, we're looking for a 30-day clock to  
6       start given -- at the end of this week, which  
7       would give us a publishing date of June 12th, if  
8       I'm not mistaken. That would be only three days  
9       before the hearings that you're talking about in  
10      the middle of June.

11                So I think there's a disagreement about  
12      whether or not -- when staff actually believes the  
13      clock is started. The 21st date is -- that I  
14      talked about earlier, and Chris had also, is  
15      simply we're trying to get as much time for staff  
16      as possible to complete its analysis. One of the  
17      things that's happened on this case is our  
18      biologist, who has been following the information,  
19      has retired, and we have a new staff that have  
20      come on board, and he's trying to get up to speed  
21      and complete his analysis on this case.

22                Although Dick Anderson, our staff  
23      biologist, has been working with the working group  
24      on this case, he's not as familiar as our staff  
25      person, Mr. Marc Sazaki, who has since retired.

1                   So -- so all these things are the  
2           reasons why staff is making the proposal today  
3           that it has. And our view is somewhat slightly  
4           different than that of the Applicant.

5                   Jeff --

6                   HEARING OFFICER FAY: Without -- without  
7           getting into the question of whether staff should  
8           manage its affairs to adjust for retirement, I'd  
9           like to explore exactly what information is at  
10          risk here, and whether or not you would have it  
11          before you when you filed your FSA on Water and  
12          Biology. And if it is the kind of thing that the  
13          record could be informed of directly from the  
14          water agency, or some -- in some other way. In  
15          other words, could you -- could you have something  
16          that staff could support as an FSA if any of this  
17          information that right now you anticipate should  
18          be in there, were -- were to not be there.

19                  Is -- is there a way to separate some of  
20          this so that it could come into the record, but  
21          perhaps wouldn't be filed at the same time as --  
22          as an FSA, that would meet an earlier schedule,  
23          like by the end of -- by the end of this month.

24                  MR. BUELL: What I would -- my response  
25          to that is I don't believe so. That what is

1 missing at this point in staff's analysis are what  
2 it believes are appropriate mitigation measures  
3 for this project. And what staff needs to do to  
4 develop those is to work with the other agencies  
5 that are involved in this, and that would be the  
6 Department of Fish and Game, as well as the  
7 Regional Water Quality Control Board.

8 That's an evolutionary process, and it's  
9 time that needs to conduct the analysis. If push  
10 were to come to shove, we'd have to prepare an  
11 analysis that -- or bite the bullet when that time  
12 came, and decide whether we have enough  
13 information to recommend approval or not to  
14 recommend approval of the project.

15 HEARING OFFICER FAY: Mr. Ogata,  
16 anything further?

17 MR. OGATA: I'm sorry, I guess my  
18 thought is, on that, maybe a little different than  
19 Mr. Buell's. Maybe we could separate that. But  
20 as you're aware, our process really requires us to  
21 coordinate with the other agencies, and to make  
22 sure that, to the extent feasible, all the  
23 disagreements are worked out. So that we don't  
24 have to take these subjects to Evidentiary  
25 Hearings and basically, you know, if everybody's

1 in agreement as to what the problem is, what the  
2 mitigation is, how it's going to be monitored,  
3 then it really will save a lot of time at the end.

4 So, I mean, my analogy is driving --  
5 driving in rush hour. If you get on the freeway  
6 when everybody else is driving, you're going to  
7 get jammed at the end. If you wait ten or fifteen  
8 minutes, oftentimes you avoid the rush hour  
9 altogether.

10 So we're really looking at a situation  
11 where if we spend an extra week or two  
12 coordinating with the other agencies, discovering  
13 what their -- their thoughts are about all of  
14 this, we could presumably save time by not having  
15 to adjudicate all these issues. Even if we were  
16 to separate this stuff out and let the agencies  
17 file their thoughts and comments separately from  
18 the staff's FSA, if there is an issue that comes  
19 up, then we're all going to be in this room having  
20 Evidentiary Hearings about that instead of maybe  
21 trying to work it out at a workshop. In which  
22 case, you could probably do it by declaration.

23 So I think there is a huge difference in  
24 terms of process here, as to how -- which way --  
25 which road we want to go down.

1                   I appreciate Mr. Ellison's comment that,  
2           you know, they're only agreeable to the schedule  
3           if they can meet their schedule. I don't --  
4           certainly, if I was sitting in -- I'd say the same  
5           thing.

6                   I guess I have a question for the  
7           Committee. You know, having heard what you said  
8           about schedule, I guess I -- I still have a  
9           question. I mean, is there no scenario that you  
10          can envision under which you could meet the  
11          schedule that staff and the Applicant have worked  
12          out? I mean, you're obviously concerned about  
13          there's no guarantees, and certainly we cannot  
14          guarantee, sitting here today, that there's not  
15          going to be a disagreement. But if there's a  
16          scenario in which there were no disagreements, is  
17          it still unlikely that the schedule could be  
18          achieved?

19                   HEARING OFFICER FAY: Well, I think -- I  
20          think you've answered your question, that the  
21          uncertainties are pretty large, and so, as I said  
22          before, I don't see how the Committee can give an  
23          estimate of how to foreshorten this without  
24          knowing what's involved.

25                   But I wanted to correct you. I think,

1 in fact, the difference we're talking about is --  
2 is probably three weeks, if -- if we were  
3 otherwise able to, as per Mr. Ellison's request,  
4 finish receiving evidence in the middle of June,  
5 as opposed to July 5th and 6th, that'd be a three  
6 week difference. And move things up accordingly.

7 Now, I think -- I appreciate what you're  
8 saying, and it's very constructive to have these  
9 things fully resolved before they're brought to  
10 the Committee. But that is what committees are  
11 appointed for, and I -- I guess I would advise the  
12 Committee to be reluctant to risk the schedule at  
13 the expense of the Applicant, just to avoid having  
14 to make a decision. It's one way of saying maybe  
15 it's just fine to have the staff and the Applicant  
16 come in, and the water agency come in to a hearing  
17 with different positions.

18 It's something that the Committee may --  
19 may have to sort out. Certainly it's not optimal.  
20 But it may be preferable to -- to absolutely  
21 having a three week slip in the schedule.

22 MR. OGATA: Well, there is one other --  
23 yeah, I understand what you're saying. There is  
24 one other circumstance about this case that is  
25 unusual from other cases. Generally speaking, the



1 PSAs that we put out reflect some analysis and  
2 reflect on the issues that are reoccurring. In  
3 this case, in the Water and Biology area, the PSA  
4 did not reflect any of that stuff. In fact, this  
5 FSA will be like a PSA, because of the status of  
6 the information that was available at the time.

7 So, I mean, that's another problem that  
8 staff is juggling with here, you know, not only  
9 are we kind of behind the eight-ball here in time  
10 because of how this information has come to us and  
11 how we're trying to work with the Applicant and  
12 trying to get this out, but all that time would've  
13 been available to us to start working with the  
14 agencies to, as we went along, to resolve these  
15 issues.

16 So, yeah, the Committee is there to  
17 resolve issues. But it seems to me it also is not  
18 efficient to have you resolve issues in which the  
19 parties themselves, with a little bit of extra  
20 time, could take care of those things. Land Use  
21 is an example. I mean, we have an outstanding  
22 issue about coastal access. I think it will be  
23 resolved. But if you needed to hear that today,  
24 we'd have to litigate that today, and maybe not  
25 achieve an optimum solution in which, you know,

1 two weeks from now I think we are going to have an  
2 optimum solution.

3 So I can appreciate what you're saying.  
4 I think you need to also take a look at the fact  
5 that this case is not proceeding along the same  
6 kind of process as we have used in other cases.  
7 So, you know, I'm not -- I'm not always going to  
8 sit here and take the Applicant's side on  
9 schedule, I think, but I think in this case it --  
10 it is worthwhile to consider whether or not, given  
11 the fact that if we're going to be able to  
12 resolve, you know, three-fourths of the issues,  
13 technical areas early, that there's going to be  
14 one or two technical issues that we're going to  
15 need a little more work on, but I -- I really  
16 can't sit here and think that we're going to be in  
17 disagreement about it, why the Committee couldn't  
18 say under those optimal circumstances it's  
19 somewhat likely, better -- chances are better than  
20 not that there'll be a schedule that we can agree  
21 to.

22 And certainly if something changes, and  
23 yeah, I'll -- everything's off the table at that  
24 point, I think, you know, that's fine with me. I  
25 don't think Mr. Ellison necessarily will agree

1 with that, but -- but at least that would give us  
2 a basis to work from. Because if we're going to  
3 have to go through this today and argue about the  
4 start date over -- over staff's schedule, to be  
5 frank, I'm not sure that's a good use of this  
6 Committee's time, you know, if we're going to be  
7 quibbling over -- over a few days here and there,  
8 I think.

9 And it seems to me if we're more focused  
10 on the outcome and seeing how we can all work  
11 together on it, I think we'll be -- have a much  
12 better project and process that will make everyone  
13 happy.

14 I don't think us quibbling about when  
15 the start date for when staff's analysis is going  
16 to come out, and you have to handle that today, as  
17 I said, I see that to be really a small thing in  
18 the overall scope.

19 But -- but that's -- that's what we're  
20 going to have to do if we can't agree that there's  
21 some schedule that's likely to happen, that --  
22 that we can -- that we're all happy with.

23 HEARING OFFICER FAY: Well, it affects  
24 the ultimate date, obviously, because the longer  
25 that the evidence is delayed coming in, and

1       because of the -- the time limits, like being  
2       issued 14 days prior to the Evidentiary Hearings,  
3       and then the time it takes the Committee to turn  
4       around a Proposed Decision based on the record,  
5       and then the time the Proposed Decision has to be  
6       out for comment, all these things add up. And  
7       some of them have no give at all, and some have --  
8       have more flexibility.

9               But I tried to convey that it's not  
10       completely elastic.

11              PRESIDING MEMBER KEESE: Mr. Fay, let me  
12       -- in order to understand this. The three weeks  
13       we're talking about here basically would double  
14       the time that we have to turn around the product,  
15       because under the expedited timeframe we're  
16       looking at two or three weeks for us to turn  
17       around the product. And if we add the three  
18       weeks, then we get six weeks.

19              It -- it's hard for me -- it's going to  
20       be hard, it's hard, in the most ideal situation,  
21       to turn something around in two or three weeks.  
22       And I think you're -- you're being generous in  
23       saying that we can make it in six.

24              Unfortunately, with that -- we just --  
25       there's no way schedule-wise that we can slip that

1 date of the 15th. If it slips -- I mean, if we  
2 don't do it on the 15th, the first we can do it is  
3 the 5th of July.

4 HEARING OFFICER FAY: I'd like to  
5 explore something you said, Mr. Ogata, about a  
6 different procedure in this case. What exactly is  
7 the difference in this case?

8 MR. OGATA: Well, it's not a different  
9 procedure. It's just there's a -- what happened  
10 -- what happened in this case is different than  
11 what we usually do in other cases. As I said, the  
12 PSA normally is staff's first assessment of all  
13 the issues --

14 HEARING OFFICER FAY: Oh, I see.

15 MR. OGATA: -- in areas. In this case,  
16 in Water and Biology, there was really no PSA.

17 HEARING OFFICER FAY: Right. But my  
18 understanding is there's no legal requirement for  
19 anything other than the staff assessment. So that  
20 --

21 MR. OGATA: That -- that's true.

22 HEARING OFFICER FAY: -- it doesn't have  
23 to be broken down into a preliminary and a final  
24 staff assessment.

25 MR. OGATA: That's true, and I'm not

1 saying that that's the way it needs to be. But  
2 I'm saying in terms of how we coordinate with  
3 other state agencies, and with other local  
4 agencies, about issues, there really wasn't --  
5 there weren't any issues to discuss because we  
6 didn't know what they were. This is really the  
7 first time where we have an opportunity to do that  
8 coordination with those issues.

9 And certainly the working group that's  
10 been going on has been doing -- taking care of a  
11 lot of that. There's no question about that, and  
12 I'm not going to dispute that. But nevertheless,  
13 there still are some, you know, Fish and Game  
14 still needs to be consulted about certain things,  
15 and, you know, these are all things that --  
16 they're minor details, but they have to be done.

17 Things like the monitoring is not a  
18 minor detail. That really hasn't been addressed  
19 in -- in any of the information that we have  
20 today. And so that's -- that's an important area.  
21 I mean, we're required by law to come up with a  
22 monitoring plan. We have to ensure that all --  
23 all the conditions are met. We haven't had a  
24 chance to do that.

25 HEARING OFFICER FAY: And are you sure

1       that -- that having two more weeks, instead of  
2       filing May 15th, filing at the end of May, or, I'm  
3       sorry -- what was your filing date for the Water  
4       and Biology?

5               MR. BUELL:  We were suggesting Water and  
6       Biology, I believe, on --

7               HEARING OFFICER FAY:  June 21st.

8               MR. BUELL:  Right.

9               HEARING OFFICER FAY:  Yeah, okay.  Are  
10       you -- I mean, how can you be confident that these  
11       large uncertainties can be resolved in that amount  
12       of time?  If there's been little communication  
13       with the water agency, or at least that they have  
14       not seen your preliminary take on that case.

15              MR. BUELL:  Oh, I think it's a  
16       mischaracterization that there's been little  
17       communication between the agencies.  There has  
18       been communication between the agencies.  They've  
19       been party to the working group, and because of  
20       that communication I think that we're a long way  
21       along in the process.

22              But we need time to review the  
23       information that we've been provided, and also  
24       work with those agencies to work out the details  
25       of mitigation that staff may think is appropriate,

1       that may not have already been identified.

2               MR. ELLISON:  Mr. Fay, if I can offer  
3       just a couple of comments.

4               Three things.  First, I would urge the  
5       Committee to keep in mind that there is a wealth  
6       of information available about the impacts on this  
7       project, precisely because we're talking about the  
8       site of an operating project.  I mean, I -- I have  
9       been before this Committee, in fact, on green  
10      field projects where the only information on these  
11      issues was computer modeling.

12              What we have in this case is not less  
13      information than the Commission has dealt with in  
14      the past, but far more information, because we  
15      have the actual impacts of the existing Moss  
16      Landing Power Plant, as measured over 50 years.

17              The second thing I would urge the  
18      Committee to keep in mind is that what we've been  
19      waiting for is the last month of 12 months of  
20      data.  And that data has been coming in month by  
21      month, and going before a technical review  
22      committee that involves the water agencies, Fish  
23      and Game, the Energy Commission, Coastal  
24      Commission.  And we have been saying for months  
25      that a great deal of work could be done based upon



1 the information where we had nine months, ten  
2 months, eleven months worth of data, because the  
3 likelihood that the last month's worth of data was  
4 not going to change these conclusions very much.

5 And one of the frustrations of the  
6 Applicant is -- is the -- is the perspective that  
7 we can't begin thinking about these issues until  
8 we have that last "i" dotted and "t" crossed on --  
9 on the data.

10 What you see now before you is all 12  
11 months' worth of data, all written up and  
12 complete. But there has been many, many meetings  
13 to discuss these issues with the technical group,  
14 and a lot of interagency coordination.

15 The last point that I want to make is  
16 this. When we discussed with the staff this  
17 morning what their need for additional time --  
18 what drove their need for additional time, staff  
19 indicated their desire to work with the other  
20 agencies and to work with the Applicant on these  
21 issues. And we fully support that. We -- we  
22 certainly want to resolve as many issues before we  
23 reach the Committee as possible, consistent with  
24 the schedule.

25 But for -- just to give you a flavor of

1 the discussion we had this morning, the staff  
2 indicated that they want to hold a workshop with  
3 the agencies, without the Applicant, to discuss  
4 these issues, and then hold a second one with the  
5 Applicant, later. In our view, one easy way to  
6 save time in this process is just to have the one  
7 workshop and include the Applicant in the first  
8 one.

9 So it's -- it's issues like that that  
10 are stretching out the schedule. And we're  
11 perfectly amenable to doing that if it doesn't  
12 impact the start of construction. But when --  
13 when issues like that begin to impact the  
14 construction date for this project, then we have a  
15 problem. And that's where we are.

16 (Pause.)

17 HEARING OFFICER FAY: We're trying to  
18 explore a little give on everybody's part. Ms.  
19 Praul brought up the possibility that if -- and  
20 correct me if I'm not doing this accurately --  
21 that if the staff's -- I understand they feel they  
22 need a 30 day period for analyzing some of this  
23 information. If -- if that started this Friday  
24 and was trimmed a bit so that the data was  
25 provided on -- in their assessment on June 6th,

1 the Committee can be available for an Evidentiary  
2 Hearing on June 20th.

3 That would move up by more than two  
4 weeks the final date, and would give the Committee  
5 a lot more flexibility in -- in meeting the  
6 Applicant's request to have a -- a Proposed  
7 Decision in early August, or at least in August.

8 Is that -- is that something that staff  
9 could consider?

10 (Pause.)

11 MR. OGATA: May we have a minute. We're  
12 going to talk to people that are directly affected  
13 by this decision.

14 HEARING OFFICER FAY: Let's take a  
15 little recess for -- what do you need, 15 minutes?

16 Okay, a 15 minute recess.

17 (Thereupon, a recess was taken.)

18 PRESIDING MEMBER KEESE: Let me just say  
19 what is on the table, and what we're talking about  
20 is we will have the hearings on the 7th and 8th.  
21 We would have a hearing in the -- down there on  
22 the 15th, and then we'll finish it up on the 20th.

23 That's -- that was what's out on the  
24 table.

25 HEARING OFFICER FAY: And -- and I

1 believe --

2 PRESIDING MEMBER KEESE: Which would  
3 mean that the staff would -- we'd have the report  
4 on the 6th of June.

5 MR. BUELL: I understand that that's  
6 what -- is that the Committee's order, or are they  
7 asking for the staff's opinion?

8 PRESIDING MEMBER KEESE: We're asking  
9 for your opinion, first.

10 (Laughter.)

11 MR. BUELL: Then I will -- then I will  
12 give you my opinion.

13 Staff feels that we lost nearly a week  
14 here, and what was the previous agreement, we had,  
15 I thought, understood that the Committee's order  
16 was it was to be 30 days after receiving the draft  
17 final, or I've forgotten the exact language of the  
18 order, draft permit, NPDES permit. And as I  
19 understand it, we're not going to receive that  
20 until this Friday, or thereabouts. Perhaps we'll  
21 receive it tomorrow, and that will make my  
22 argument moot.

23 But it seems as though we've lost a few  
24 days here that are critical. It seems like every  
25 hour is critical to staff.

1           I wanted to point out a couple of things  
2       that we haven't really made clear previously, is  
3       -- is that the information that we have been  
4       waiting for thus far in the case has been normally  
5       information that we would have required for data  
6       adequacy. In this case, we accepted the -- this  
7       application with the presumption that we'd get  
8       this information in a timely manner for staff to  
9       prepare its analysis.

10           We're now in the, well, the eleventh  
11       hour of this process, and staff is being asked to  
12       prepare an analysis that normally would've taken  
13       us six months to prepare.

14           So with that understanding, you know,  
15       we're trying to accommodate both the Committee and  
16       the Applicant, and we would like to abide by the  
17       agreement that we had previously made, which was  
18       the 30 days after receiving the final draft  
19       permit, NPDES permit.

20           Jeff, is there something I left out?

21           HEARING OFFICER FAY: Mr. Ellison.

22           MR. ELLISON: We think the Committee's  
23       proposal is a good one. In terms of -- of the  
24       staff's concerns just expressed, I would point out  
25       a couple of things.

1                   One, as I mentioned earlier, the --  
2           well, let's take the worst -- the worst case is,  
3           you know, we believe that the -- the -- that the  
4           so-called final draft permit comes in this week on  
5           the last day of the week. That's the 12th. What  
6           we're talking about here is shortening the 30 days  
7           that they -- that our agreement with the staff  
8           called for by six days, from June 12th to June  
9           6th. That's the worst case.

10                   I would then point out that mitigating  
11           that is the fact that the staff has had since  
12           April 21st a draft of the final draft permit,  
13           which, as far as we know, the only comments that  
14           have been made on it, the only changes anybody's  
15           asking for are changes that Duke has asked for,  
16           and they are minor clarifications. Duke's  
17           position is that the 30 days could have and should  
18           have started on April 21st, based on that  
19           information being available.

20                   So I think it's a perfectly reasonable  
21           schedule that the Committee has proposed, and one  
22           that meets the important public objective of  
23           having this project online for the summer of 2002.

24                   Actually, let me add one other thing,  
25           just -- Mr. Buell mentioned that these were data

1       adequacy requirements that had somehow been waived  
2       for this project. I want to make clear that Duke  
3       takes exception to that, does not agree with that.  
4       I don't think any data adequacy requirements were  
5       waived for this project. And in fact, for -- for  
6       most projects that the Energy Commission sees, the  
7       level of information that we're talking about here  
8       would be absolutely impossible at any time, and is  
9       certainly not a data adequacy requirement.

10               So to suggest that other projects have  
11       been held to this standard and that somehow Duke  
12       was -- was let off the hook on data adequacy is  
13       simply not, in my opinion, true at all.

14               HEARING OFFICER FAY: Okay. Any further  
15       response, then, on the Committee's proposal? I  
16       think we've heard from both parties, and  
17       understand their concern.

18               PRESIDING MEMBER KEESE: There's merit  
19       on both sides. I hear -- I hear the argument.  
20       It's sort of cutting the baby in half here to --  
21       to decide whether it's April 21st or it's this  
22       Friday, but the Committee has deliberated here and  
23       I will suggest that I think that we should just  
24       order that we'll have the schedule of hearings on  
25       the 7th and 8th, hearing on the 15th, and the

1       hearing on the 20th, and staff to have the report  
2       by June 6th. With the concurrence of Commissioner  
3       Moore. And certainly hope that the document shows  
4       up by this Friday.

5               Mr. Fay.

6               HEARING OFFICER FAY: Okay. Thank you.

7               You have the Committee's order on that.

8       So those are the hearing dates and the filing  
9       dates.

10              And I will talk to the parties  
11      informally. We don't need to take time on the  
12      record to do this, but I'd just like them to think  
13      about the need, if any, to hold the Evidentiary  
14      Hearings on Biology and Water down in Moss  
15      Landing. If it is -- if it is not essential, both  
16      from -- because of, for instance, lack of public  
17      interest in those details, and if the agencies  
18      which may comment are state level and located  
19      here, as opposed to regional and located down  
20      there, those are the kinds of factors I'd like to  
21      know about. But it would give the Committee more  
22      available time.

23              Commissioner Keese is the only one  
24      available for that day on the 20th. The following  
25      day he has to be in Burney for an Evidentiary



1       Hearing on the Three Mountain case. So more hours  
2       of hearing time would be available if we could  
3       hold the hearing here, but we don't want to give  
4       short shrift to the public and the agencies down  
5       there if these issues are important to them, and  
6       if they might wish to come in and comment. That's  
7       our concern.

8                Another factor would be if the parties  
9       feel very comfortable that these matters can be  
10      put into evidence without much dispute or cross  
11      examination, then, again, it would be easy to hold  
12      the hearing down in Moss Landing, because of the  
13      -- the shorter time for the hearing. But reality  
14      is it takes time to get down there and back, and  
15      the Chairman has more hours available if the -- if  
16      the hearing is here. So I'll talk to the parties  
17      later as to the location. But you have the time.

18              What I'd like to do is just go down the  
19      list, just take a few minutes, sort of a -- a  
20      checklist. I'd like the parties to interrupt me.  
21      Mr. Buell and Mr. Ellison, when I get to a topic  
22      that has any kind of wrinkle at all at this time,  
23      other than -- than -- that you know right now you  
24      could submit the written testimony on May 15th,  
25      with a declaration, and that it's undisputed. If

1       that is not the case, I'd like just to get the  
2       details of what is missing and what the timing is.

3               MR. ELLISON:  Mr. Fay, before we start  
4       that can I ask a clarifying question?

5               HEARING OFFICER FAY:  Sure.

6               MR. ELLISON:  One of the ways that we've  
7       attempted to expedite this process is to have the  
8       Applicant's testimony due at the same as the FSA.  
9       But the Committee order calls for all the  
10      Applicant's testimony to be due on the 15th.

11              I would request, since it won't, I don't  
12      think, affect the schedule and might actually  
13      promote settlement of issues, if we could file our  
14      testimony on the same day that the corresponding  
15      FSA section is due.  So, for example, we won't  
16      file our Water testimony on Monday, but rather  
17      would work with the staff to resolve these  
18      remaining issues and then file together with them  
19      on the 6th.

20              Does that make sense?

21              HEARING OFFICER FAY:  Yeah, it makes a  
22      lot of sense.  And in fact, the only reason to  
23      have moved forward the Applicant's filing was to  
24      make it coincident with the staff's, so that staff  
25      was not at a disadvantage getting something a week

1 later, after they had filed. But I think it's  
2 appropriate that we just link the testimony in  
3 each of the subjects to come in on the same day.

4 Okay. Project description, and I  
5 understand need conformance would be disposed of  
6 with just a statement by staff counsel.

7 Public Health, is that complete?

8 MR. BUELL: I believe we have no  
9 disputes on Public Health.

10 HEARING OFFICER FAY: Okay. And so the  
11 fact that there's some questions about Air Quality  
12 would not hold up Public Health; right?

13 MR. BUELL: Not at this time.

14 HEARING OFFICER FAY: Okay. But I think  
15 your -- your statement listed it as incomplete,  
16 but we can -- we can count on that coming in on  
17 the 15th.

18 MR. BUELL: We are prepared to publish  
19 it on the 15th, and --

20 HEARING OFFICER FAY: Okay.

21 MR. BUELL: -- I believe there will be  
22 no issues between the staff and Applicant.

23 HEARING OFFICER FAY: Okay.

24 MR. BUELL: On that topic.

25 HEARING OFFICER FAY: Worker Safety and

1 Fire Protection. Transmission Line Safety and  
2 Nuisance. Hazardous Materials Management. Waste  
3 Management. Land Use, I understand, is  
4 incomplete.

5 MR. BUELL: Right. And I believe we had  
6 agreed to publish that on May 30th. Is that  
7 right? With Air.

8 MR. ELLISON: That's -- that's fine.  
9 That's acceptable to us.

10 HEARING OFFICER FAY: May 30th?

11 MR. ELLISON: There is one remaining  
12 issue that we want to work with the staff and the  
13 Coastal Commission.

14 HEARING OFFICER FAY: Can you just  
15 briefly tell us what that is?

16 MR. ELLISON: It's -- it's the -- one  
17 upper stack has a provision for the provision of  
18 coastal access, and we've made a proposal of  
19 different ways of providing that access. But we  
20 haven't reached final agreement with the Coastal  
21 Commission on that, so we need to continue to talk  
22 to them.

23 HEARING OFFICER FAY: So it's just the  
24 Coastal Commission that you need to reach closure  
25 with?

1 MR. ELLISON: Well, and the staff.

2 HEARING OFFICER FAY: And the staff.

3 Okay. Is the staff going to mainly defer to the  
4 Coastal Commission?

5 MR. OGATA: I wouldn't say we're going  
6 to mainly defer, but certainly they have a lot of  
7 input into this process. But we have some  
8 concerns, as well.

9 HEARING OFFICER FAY: Traffic and  
10 Transportation.

11 MR. BUELL: Traffic and Transportation,  
12 staff has -- has made changes in its conditions  
13 for certification to -- since the issuance of the  
14 PSA, and those have not been reviewed by the  
15 Applicant. There's a possibility that we may have  
16 some minor -- I'm hoping to be minor disagreements  
17 between the parties.

18 HEARING OFFICER FAY: Okay. But you're  
19 ready to file that on the 15th?

20 MR. BUELL: We're ready to file.

21 HEARING OFFICER FAY: Okay. And does  
22 that involve like bicycle lanes, or the easement  
23 in front?

24 MR. BUELL: Our conditions of  
25 certification deal with a number of issues,

1 including those, I believe.

2 HEARING OFFICER FAY: Okay. Anything  
3 from your point of view, Mr. Ellison?

4 MR. ELLISON: No, other than -- and I  
5 would say this about any of these issues, where  
6 there, you know, where we think there are no  
7 issues. Obviously, if we get surprises in the FSA  
8 we'll have to work with the staff on those, or --  
9 or adjudicate them in the hearings. But we don't  
10 -- we don't anticipate that happening, and we  
11 don't know of any disagreements now.

12 HEARING OFFICER FAY: Noise. Visual  
13 Resources. Cultural Resources. Socio-Economic  
14 Resources. Geologic and Paleontologic Resources.  
15 Facility Design. Power Plant Reliability. Power  
16 Plant Efficiency. Transmission System  
17 Engineering.

18 MR. BUELL: Again, staff has made some  
19 changes to its conditions of certification that  
20 the Applicant may or may not take exception to,  
21 but until they see the draft they won't be able to  
22 make that determination.

23 HEARING OFFICER FAY: This in TSE?

24 MR. BUELL: This is in TSE.

25 HEARING OFFICER FAY: Okay. How do you

1 characterize that, since I assume there's little  
2 redesign involved at an existing site.

3 MR. BUELL: I believe it's primarily a  
4 change in the way that we're presenting some of  
5 the conditions. Previously, some of the items  
6 were in Facility Design, in terms of specifying  
7 how review of the design would take place, and now  
8 they're being placed in Transmission Line System  
9 Engineering. And so that change is minor, but it  
10 might be --

11 HEARING OFFICER FAY: So it has to do  
12 with --

13 MR. BUELL: -- highlighted.

14 HEARING OFFICER FAY: -- review. Not a  
15 direct requirement of a design change.

16 MR. BUELL: That's correct.

17 HEARING OFFICER FAY: And Compliance, I  
18 assume no -- nothing there.

19 Okay. Now --

20 MR. BUELL: Before I -- you went off  
21 quickly on Worker Safety and Fire Protection, and  
22 let me take an opportunity to identify that we're  
23 changing one of the conditions of certification  
24 dealing with the purchase of a fire truck. And --  
25 although I think we're very close to reaching

1       agreement with the Applicant on what the nature of  
2       that language should be. And again, there may be  
3       some minor dispute there about how to phrase the  
4       condition.

5               MR. ELLISON: I would mention one issue  
6       related to alternatives. We do have a -- a legal  
7       issue, not a factual issue, between ourselves and  
8       the staff, which is that the -- our view of the  
9       Warren-Alquist Act is that the act specifically  
10      says you do not need to do a review of alternative  
11      sites for a modification of an existing facility,  
12      based on the fact that there's only one facility  
13      that you can modify and there is no alternative  
14      site that has the facility there, except for the  
15      location of the facility itself.

16             Staff's taken the position that -- that  
17      it is prudent, even though they don't believe it's  
18      necessarily legally required -- I don't want to  
19      put words in your mouth, Jeff, if I  
20      mischaracterize it please correct me -- but even  
21      though they believe it's not legally required, has  
22      taken the view that it's prudent to go ahead and  
23      do an alternative site analysis. And they have  
24      done -- done one in the PSA, and I understand will  
25      do one in the FSA.



1                   Our disagreement with the staff is not  
2                   with their conclusion or with any of the facts,  
3                   it's not an issue for cross examination or  
4                   adjudication. But we may want to file a brief  
5                   before the Committee and ask for a ruling on the  
6                   issue of whether the Warren-Alquist Act requires  
7                   that analysis or not.

8                   HEARING OFFICER FAY: Okay.

9                   All right. Air Quality, you expect the  
10                  FDOC to come in by Friday?

11                  MR. BUELL: That's the latest that I've  
12                  heard, yes.

13                  HEARING OFFICER FAY: Okay. And will  
14                  that -- is your expectation that there'll be few  
15                  -- few changes there, and you'll be able to file  
16                  on that on the 15th?

17                  MR. BUELL: It's my expectation that our  
18                  staff will be able to incorporate the conditions  
19                  of -- in the FDOC into our FSA by the end of this  
20                  month, June -- May 30th, or 31st, depending upon  
21                  the Committee's pleasure.

22                  I don't see any major issues in that  
23                  area at this point in time, but I could be  
24                  mistaken.

25                  HEARING OFFICER FAY: Okay. Anything

1 further on alternatives, Mr. Buell, from your  
2 perspective? Is that pretty --

3 MR. BUELL: No.

4 HEARING OFFICER FAY: -- pretty much  
5 just a legal --

6 MR. OGATA: Right. We're just waiting  
7 to see the outcome of Water and Biology, but the  
8 section is prepared, just awaiting the outcome of  
9 any --

10 HEARING OFFICER FAY: All right.

11 MR. OGATA: -- of a significant impact  
12 analysis.

13 HEARING OFFICER FAY: And I think we've  
14 got -- we've had a pretty thorough discussion on  
15 Biological Resources and Water Resources. So  
16 based on the Committee order, the staff and  
17 Applicant will file their testimony on that on  
18 June 6th, and we'll hold the hearing on that, plus  
19 alternatives, I guess, as it affects those areas,  
20 on June 20th, as well.

21 I'm assuming Air Quality would be on  
22 held on June 15th.

23 Just as a recap, then. The testimony to  
24 be filed -- I'm working backwards now -- on June  
25 6th, is Biology, Soil -- I mean, Soil and Water,

1 and Alternatives. And to be filed on May 30th --

2 Mr. Buell, what -- what are our topics?

3 MR. BUELL: I believe we talked about  
4 Air Quality and Land Use.

5 HEARING OFFICER FAY: Land Use. Just  
6 those two? Okay.

7 And so the -- and those would be heard  
8 on June 15th. And then everything else would be  
9 filed on May 15th.

10 Anything to add to this? Any questions?

11 MR. OGATA: Not in respect to any of  
12 this, but I just wanted to give you kind of an  
13 interesting side note about the compliance matters  
14 in this case.

15 Commissioner Moore actually raised it,  
16 brought it to my attention -- reminded me of it.  
17 The County of Monterey does not currently have a  
18 chief building official, and they have declined to  
19 be our delegate in this matter if this case goes  
20 to licensing. And so our staff is now in the  
21 process of determining how we are going to carry  
22 out the compliance monitoring for this project  
23 without a local CBO.

24 It appears that we will be -- that Duke  
25 will be assisting us in identifying prospective

1 companies that will become the Commission's  
2 delegate in overseeing all the plan checks and  
3 inspections. And we're still going to have to  
4 work out how the County of Monterey gets that  
5 information, if they're interested in getting that  
6 information. Apparently they're just now not in a  
7 position to deal with this.

8 So that's -- that's an interesting side  
9 note for the Commission. We'll be actually  
10 overseeing the construction of a power plant,  
11 apparently.

12 HEARING OFFICER FAY: But my impression  
13 is that in terms of time criticality, that that  
14 has more to do with from the date -- if the  
15 Commission is to approve this application, it's  
16 from that date on, rather than anything between  
17 now and that date.

18 MR. OGATA: Well, that's correct, except  
19 for the fact that because of our -- our conditions  
20 do require lead time approvals for a number of  
21 things, and as you've heard several times today,  
22 they would like to start construction October 1st,  
23 Commission staff and the delegate may be  
24 responsible for starting to review -- not approve,  
25 but starting to review a number of designs and

1 things like that, in the event that the project  
2 becomes certified by the Commission, at which  
3 point then I suppose we could actually approve all  
4 the designs.

5 HEARING OFFICER FAY: Are you aware of  
6 the Commission doing this ever before, using a  
7 hired consultant?

8 MR. OGATA: I -- well, hired consultants  
9 are typically used, but typically the Commission  
10 is not the -- the overseer of the consultant. It  
11 typically is the local building official.

12 HEARING OFFICER FAY: Okay. Is this  
13 something the Committee needs to be concerned  
14 about, in terms of the staff's ability to deal  
15 with the issue?

16 MR. OGATA: I sure hope not.

17 (Laughter.)

18 HEARING OFFICER FAY: Okay.

19 MR. OGATA: I just wanted to bring it to  
20 your attention, because it is very unusual, and  
21 because we are going through some issues about,  
22 you know, public notice, things like that, because  
23 a number of these things are being done in the  
24 siting, during the siting phase. Again, it's not  
25 unusual for Applicants to want to do some advance

1 work with us, because of the lead times and  
2 things, but -- but this is really different  
3 because of the situation we're in.

4 HEARING OFFICER FAY: Well, obviously  
5 the Applicant has an incentive to try to make this  
6 go smoothly, and I'm sure is going to help staff  
7 on that. Knows that the staff isn't going to be  
8 able to send half a dozen people from the Siting  
9 Division down there with hard hats to take a look  
10 at things.

11 MR. OGATA: No. They're going to be  
12 very cooperative. They've just, you know, we're  
13 all in a new area here, so we've been struggling  
14 through it.

15 HEARING OFFICER FAY: Right. A busy  
16 time.

17 Okay. Any further comments then, before  
18 we adjourn? I think you have -- you have the  
19 Committee's order. We will get out something in  
20 writing, but you have it officially, and you can  
21 rely on it.

22 Thank you all. We're adjourned.

23 (Thereupon, the Prehearing Conference  
24 was adjourned at 2:50 p.m.)

25

## CERTIFICATE OF REPORTER

I, DEBI BAKER, an Electronic Reporter,  
do hereby certify that I am a disinterested person  
herein; that I recorded the foregoing California  
Energy Commission Prehearing Conference; that it  
was thereafter transcribed into typewriting.

I further certify that I am not of  
counsel or attorney for any of the parties of said  
Prehearing Conference, nor in any way interested  
in the outcome of said Prehearing Conference.

IN WITNESS WHEREOF, I have hereunto set  
my hand this 17th day of May, 2000.

DEBI BAKER

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